IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

OSA NO.5 Of 2000 with
CROSS OBJECTION NO.9 Of 2000
Judgment Reserved on:4.5.2007.
Date of decision: May 16th, 2007.

M/S Satnam Construction Company. …. Defendant-Appellant.

Vs.

M/S Gujrat Ambuja Cements Ltd. ……Plaintiff-Respondent.

Coram

The Hon'ble Mr.Justice Deepak Gupta, Judge.

The Hon'ble Mr.Justice Surinder Singh, Judge.

[*] *Whether approved for reporting? No.*

For the appellant: Mr. Bhupender Gupta, Sr. Advocate with Ms. Charu Gupta, Advocate.

For the respondent: Mr. B.K.Sood, Advocate, vice Mr. K.D. Sood, Advocate.

Surinder Singh, J :

The defendant-appellant has filed the instant appeal, feeling aggrieved by the judgment and decree passed by the Learned Single Judge in Civil Suit No.177 of 1995 dated 21.9.1999, whereby the suit of the plaintiff-respondent was decreed for a sum of Rs.1,65,260/- with interest at the rate of 18% per annum from the date of filing the suit i.e. 23.5.1995 till its realization with proportionate cost and the counter claim filed by the defendant appellant was dismissed.

Case of the Plaintiff.

In brief, the necessary facts giving rise to the present appeal are that the respondent, hereinafter called the plaintiff, in order to set up a cement plant in village Suli, P.O. Darlaghat, Tehsil Arki, District Solan,

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[*] ***Whether reporters of local Papers may be allowed to see the judgment?***
Yes.

H.P. awarded the work of fabrication and erection on 31.7.1993 in favour of the appellant now referred as defendant. In pursuance to the work order, a sum of Rs. 1,00,000/- was advanced by the plaintiff to the defendant- company for mobilization of manpower and machinery. The defendant started the fabrication work on 20.8.1993. When the work was in progress, number of complaints were allegedly received from the staff and workers of the defendant-company, regarding the non-receipt of the wages for the last about 3 months. Plaintiff issued a warning letter to the defendant on 23.12.1993 for making the payment to the staff/ workers by 7th of each month and to provide license to them under Contract Labour (Regulation and Abolition) Act, 1970. Plaintiff alleged that on 28.12.1993 the Site Engineer found that the defendant-company was using non-standard electrodes which were seized and the defendant-company was warned orally. On receiving these complaints, the plaintiff became concerned about the timely payment to the labourers and tightened the supervision on undergoing work being performed by the defendant. On 4.1.1994, the defendant sent a letter to the plaintiff for revising the rates for pipe work and also complained of different rates of consumable being charged by the Stores Department of the plaintiff, these items could have been purchased by the defendant from outside but the plaintiff was under no obligation to supply the defendant. Again a complaint was received by the plaintiff that the defendant did not make the payment of wages to the labour for the month of December, 1993, on which the plaintiff wrote a letter on 15.1.1994 to the defendant for making immediate payments to avoid any complication, failing which the plaintiff would be compelled to make alternative arrangements, even despite that the defendant remained unconcerned. Further, the defendant-company insisted, not to recover debit notes from their bills were passed and asked the plaintiff to pay money to them for making the labour payments. Because of non-payment

to labour the situation went out of their control. Had the defendant used the mobilization advance for making the timely payments, no complication would have arisen. On account of the above alleged mal-practices, the plaintiff terminated the contract with the defendant and duly informed the defendant. It is alleged that the FIR was also lodged by the workers of the defendant for not making payment of wages to them. The plaintiff had made full and final payments to the workers of the defendant in the presence of the Labour Enforcement Officer (C) on 3.2.1994. No one came to the spot from the side of the defendant and plaintiff was compelled to seize the machinery on 15.2.1994 under the supervision of police with a view to award the work to some other agencies.

The plaintiff is alleged to have suffered the loss to the tune of Rs.8,60,652, which has been calculated under the different heads as follows :-

"a)	**Balance of un-recovered mobilization amount.**	**:**	**Rs. 58,882.00**
b)	**Balance of payments made to the defendant (including advance payments) and bills passed of work done by the defendants.**	**:**	**Rs.1,65,260.00**
c)	**Materials issued and not accounted for by the defendant.**	**:**	**Rs. 6,33,190.00**
d)	**Recovery on accounts of material issued on loan basis which was not returned.**	**:**	**Rs. 44,438.00**
	Total	**:**	**Rs. 9,01,770.00**
	Less retention money retained out of the bills of the contractor.	**:**	**Rs. 41,118.00**
	TOTAL	**:**	**Rs. 8,60,652.00"**

The plaintiff also claimed an amount of Rs.1,93,647/- as interest @ 18% per annum upto May, 1995 and prayed for the decree.

CASE OF THE DEFENDANT

The defendant resisted and contested the claim and filed the written statement whereby the preliminary objections regarding the cause of action and estoppel were raised inter alia also pleaded that the amount claimed has been exaggerated by the plaintiff to bring the matter within

the jurisdiction of this court and further pleaded that plaintiff did not approach the court with clean hands. The plaintiff put a counter claim of Rs.15,81,025/-. The defendant-company has admitted the receipt of the amount of Rs.1,00,000/- from the plaintiff towards the mobilization of manpower and machinery. It is denied that any complaint was received by the plaintiff for using sub-standard material. Precisely, it has been pleaded by the defendants that the work could not be completed due to non-payment of the running bills by the plaintiff company. The termination of the contract was alleged to be illegal and on such termination the machinery of the defendant was not released by the plaintiff, which the defendant could have used it for earning the money thus suffered the loss of Rs.8,64,000/- for non-release of the machinery.

The defendant-company filed the counter claim to the tune of Rs.15,81,025/-, the details of which are given below:-

S.No.	Description	Amount
1.	Store recovery made for cement & G.L.Hooks which were supposed to issue us free of cost as per clause 1-0 and 7-0 of work order (Attached as Ann.A).	22,525.00
2.	Difference in actual expenditure on piping job and awarded rate of structurals on 50 Metric Ton of Piping job 2750-2200 = 1550 x 50	77,500.00
3.	Labour and staff idle wages from 20.8.1993 to 5.10.1993	45,000.00
4.	3rd R.A. Bill amounting (Bill with Ambuja)	1,88,000.00
5.	Idle labour wages and production loss due to non-availability of material and Drawings.	42,000.00
6.	Bill value for the work done from 1.1.1994 to 10.1.1994	62,000.00
7.	Site mobilization expenditure lump-sum.	1,30,000.00
8.	Site demobilization charges.	25,000.00
9.	Colony, office, store and workshop shed construction expenditure.	1,25,000.00
		7,17,025.00

10. Hire charges of our machinery which the plaintiff is utilizing at site, the details of machinery being utilized is given below:-

LIST OF MACHINERY

S.No.	Particulars	Qty.	Hire charges per day		Total
10(i)	Welding sets 400 Amps.	80	.0050.00		400.00
(ii)	Welding set double holder 400 Amps.	1	100.00		100.00
(iii)	Cutting torch	2			
(iv)	Regular LPG and Oxygen	2	2 sets x 15		30.00
(v)	Cutting set	40 mtrs			
(vi)	Hand winch 5 Ton capacity	1			
(vii)	Wire rope half inch 200 mtrs.	200mtrs	100.00		100.00
(viii)	Drill machines stand.	1	25.00		25.00
(ix)	Drill machines 11/4" capacity	1			
(x)	Chain block 2 Ton capacity (old)	1	10.00		10.00
(xi)	Screw Jack	1	10.00		10.00
(xii)	Chain block 2 ton capacity	2	15.00		30.00
(xiii)	Triffer 3 Ton capacity	1	15.00		15.00
					720.00
	Hire charges per month		720x30		21,600.00
	Total Hire charges from lst March 1994 to 30.6.1997 i.e. 40 months.		21600 x 40	=	8,64,000.00
					7.17.025.00
			Total	=	15,81,025.00

In reply to the counter claim, the plaintiff denied the case as set up by the defendant and prayed for its dismissal as having barred by limitation.

ISSUES

On the pleading of the parties, the learned Single Judge on 22.10.1997, framed the following issues to resolve the controversy:-

1. Whether the suit is pre-mature and the plaintiff has no cause of action to file the suit, as alleged? OPD.

2. Whether the plaintiff is estopped from filing the present suit on account of its own acts of omission and commission and acquiescence, as alleged? OPD.

3. Whether the suit has been filed through a competent person? OPP.

4. Whether the defendant has suffered any damages, as alleged, if so, to what amount of damages the defendant is entitled? OPD.

5. Whether the work has been illegally and unlawfully terminated by the plaintiff? OPD.

6. Whether the counter-claim of defendant is not within time? OPP.

7. Whether the plaintiff is entitled to recover the amount from the defendant, if so, to what extent? OPP.

8. In case of a decree being passed in favour of the plaintiff or the defendant, to what rate of interest, if any, is the plaintiff or defendant entitled? OP Parties.

9. Relief.

FINDINGS ON ISSUES BY THE LD.SINGLE JUDGE.

The parties led their evidence and on hearing the learned counsel for the parties and upon going through the record, the learned Single Judge held that the suit was properly constituted and filed through a competent person and further held that the contract was validly terminated on 29.1.1994, the plaintiff has a cause of action and the suit was not pre-mature. There was no acquiescence on the part of the plaintiff, hence, it was not a case of estoppel and further that in view of Ext. DA and DB, the plaintiff was entitled to recover only a sum of Rs,1,65,260/- from the defendant and no other amount as claimed with interest as stated above. The counter claim was held to be time barred. Consequent upon these

findings in favour of the plaintiff, the suit was partly decreed and the counter claim was dismissed.

CONTENTION IN APPEAL BEFORE US.

Against the aforesaid judgment and decree the defendant filed the appeal and also assailed the findings which led to the dismissal of the counter claim, the defendant-company contended that the evidence on record was not appreciated in the right perspective by the learned Single Judge. The provisions of the Code of Civil Procedure and the Limitation Act were ignored from consideration. Documents Ext. PW2/C, DA and DB were mis-appreciated which shows the non-application of the mind. The learned Single Judge was highly mechanical, who proceeded in a fashion to hold the plaintiff was within its rights to terminate the agreement, but the termination was without prior notice, thus illegal and arbitrary. In nut shell, it is contended that the evidence on record was not appreciated correctly, which has caused miscarriage of justice.

CROSS- OBJECTIONS to the appeal **FILED BY THE PLAINTIFF.**

The plaintiff filed the Cross-objections under Order 41 Rule 22 of the Code of Civil Procedure alleging that the claim of the defendant-appellant for the recovery of balance amount as originally claimed in the plaint should have been decreed in toto, which according to the plaintiff stood proved on record and no relief was granted by the learned Single Judge.

Submissions before us

We have heard the learned counsel for the parties and have gone through the record in all meticulous details. Shri Bhupender Gupta learned Senior Advocate, for the defendant (appellant) has vehemently argued that the plaintiff-company has unilaterally and arbitrarily terminated the contract. He pointed out that the evidence on record to show that the

breach was on the part of the plaintiff. Therefore, the plaintiff, could not have rescinded the contract. It is also urged that the learned Single Judge has not referred the oral evidence on record while deciding the issues aforesaid. He also took pains to take us through the oral as well as documentary evidence on record. Further according to him the counter claim was within time which stood proved and should have been allowed. In nut-shell, he prayed for the reappraisal of the evidence adduced on record and allow the appeal.

On the other hand, Shri B.K. Sood, learned counsel for the plaintiff has submitted that the reasons for terminating the contract were absolutely clear and proved on record. Thus prayed for the dismissal of appeal and contended that the counter-claim was not proved and was also held rightly as having been time barred and further argued that the decree should have been passed for the whole amount as claimed by the plaintiff.

Our **FINDINGS**

We have given our thoughtful consideration to the rival contentions of the parties. To appreciate the points raised, it shall be relevant to reappraise the oral as well as documentary evidence placed on record.

It is an admitted fact that the defendant-company was awarded work order for fabrication and erection, vide letter Ext.PW1/C (colly). The agreement contains the entire terms and conditions of the work to be done. According to PW-1 Shri Umesh Shanker, pursuant to the agreement aforesaid a sum of Rs.1,00,000/- was paid to the defendants for mobilization of labour and machinery. The defendant in fact had started the work w.e.f. 20.8.1993. During the execution of work number of complaints were received from the labourers working with the defendant, with respect to non-payment of the wages to them.

Shri R.K. Soni (PW2) was the Manager of the Project and was looking after the mechanical work of Plaintiff Company. Both these

witnesses have deposed that the defendant-company used the sub-standard welding electrodes, regarding which complaint was made to the Vice-President of the plaintiff-company vide letter Ext.PW2/A. The Vice-President instructed them to have a close supervision and proper watch on the working of the defendant It is also deposed by PW-1 that the amount of Rs.1,97,200/- were paid as wages to the labourers by the plaintiff Company, in its capacity being the Principal employer in his presence as well as the representative of the defendant. To prove this fact, he has proved receipt Ext.PW1/F. The letter Ext.PW1/C contains Annexure-I providing for the termination of the contract. Its clause 11.1 states as under:-

> "The company reserves the right to terminate the contract at any point of time, without giving any prior notice and without assigning any reasons therefore. The contractor shall vacate the site forthwith and remove all their materials at their own cost, upon receipt of intimation about termination of the contract. Contractor has agreed that in such a situation of termination of the contract, they shall not lodge any claim for compensation or damage in respect of the balance material as remaining unsupplied under this contract and that the company shall not be liable to entertain or pay any claim, compensation or damage of whatsoever nature, in case of termination of contract by the company. The contractor has also agreed to pay to the company the entire amount of Security Deposit, unadjusted mobilization advance and other advances with interest at the rate of 24% per annum on the entire amount for such deposits and advances, given by the Company."

It is absolutely clear that the plaintiff-company had reserved the right to terminate the contract on 29.1.1994 without giving any notice and without assigning any reason. The contract of the defendant was terminated on 29.1.1994 vide letter Ext.PW1/G, which was sent to the defendant-company with reference to their various letters, as mentioned therein explaining their position and further made it clear that they never heard the situation where the Contractor expected the payment for his

labour directly by the Company and also that the responsibility of controlling the labour was not of Contractor rather that of principal employer. Responding to their points raised, they imputed the allegations of inefficiency and improperly managing their own affairs and apprehended that if they are allowed to continue to work without making payment to their labour, one day the defendant company might abscond from the site leaving the liability of labour payment on the plaintiff company, followed by the labour unrest, which would affect their other works. It was also clarified that the plaintiff company had continued with the mal-practice by not paying the work dues rather absconded from the site since 16th January, 1994. In view of this, by invoking the provisions of Clause 11.1, the plaintiff company terminated the contract with immediate effect, with a request to settle their bills and dues with their accounts Department after paying all liabilities. Though Clause 11.1 of the Contract aforesaid provides that no notice was required to be given by them, but perusal of the letter aforesaid is clear that the reasons for terminating the contract with the defendant have been given and before terminating the agreement the plaintiff has apprised the defendant company vide letter Ext PW1/E to defray the Wages of the labourers and warned to avoid this practice in future, in case such an activity would continue they may think whether to continue the contact or not .This letter was followed by another letter Ext Pw1/D almost repeating the same thing. Further the witnesses of the defendant could not prove its case that the plaintiff had committed the breach of the contract. The defendant by placing on record the communications Ext.D1/A to C had tried to prove that the labour payments were delayed by the plaintiff and drawings and plant material with consumable were not supplied. But it is pertinent to note that the defendant company did not say anything in response to the letter Ext.PW1/G nor any cogent evidence to substantiate their plea was

led. Rather it is proved on record that the defendant had abandoned the site and the labour payments were deposited by the plaintiff company.

It is pertinent to note that after the institution of the suit, the defendant was asked to conform the balance of Rs.1,65,000/- vide Exts. DA and DB and to send the duplicate copy of the bill to the plaintiff company, failing which it would be deemed to have been accepted. These documents were admitted by PW3 Ajay Kumar. The defendant has neither disputed the same nor stated that they were not liable to pay aforesaid amount there is also nothing on record to show that any response was made by the defendants to the plaintiff in this behalf. Therefore, plaintiff was rightly held entitled to recover the amount of Rs.1,65,260/-. We have also found that the suit was not premature because the letter Ext.PW1/G gave an option to the defendant to settle the account, if they did not respond for a long time that would not debar the plaintiff to file the suit to recover their amount.

As far as the counter claim filed the defendant is concerned it is an admitted fact that the contract was terminated on 29.1.1994 by letter Ext.PW1/G vide which the defendant was informed to settle the bills and dues as aforesaid. The intention of the plaintiff has been absolutely clear that both the parties, once for all, should settle the accounts. Thus it was for the defendant company to approach the plaintiff and do the needful well within time. Since the claim was not filed within time in the civil Court, it was barred by limitation, we are absolutely clear in our mind that the correspondence exchanged between the parties, in no manner will either extend the limitation or start the same for the purposes of the suit. The cause of action had arisen to the defendant on the date aforesaid whereas; the counter claim was filed on 2.7.1997 i.e. after the lapse of the period of three years. Therefore, it is rightly held to be barred by limitation.

Thus on the re-examination of the record and on reappraisal of the evidence our conclusion is also the same as arrived at by the learned Single Judge, therefore, we hereby affirm the issue wise findings and the plaintiff-Company was rightly held entitled to an amount of Rs.1,65,260/- with interest at the rate of 18% per annum and the counter claim was also rightly dismissed on the point of limitation.

No other points urged.

Consequent upon the aforesaid conclusion arrived by us, the appeal filed by the defendant and cross-objection filed by the plaintiff are dismissed with costs.

(Deepak Gupta)
Judge.

May 16th, 2007.
(PDS)

(Surinder Singh)
Judge.